

SOPA, PIPA, ACTA and TPP: The Creation of IP Law in 2012

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Observation One: Secrecy

“Consider the value of transparency and the difference between open code ... and closed code. Secret laws are not law. ... Closed code hides its systems of control; open code can't. Any ... system built into open code is transparent to those who can read the code, just as laws are transparent to those who can read Congress' code - lawyers.”

Lawrence Lessig, *The Code Is the Law*, *The Industry Standard*, April 9, 1999.

FOIA National Security Exemption

protects from disclosure matters that are “(A) specifically authorized under criteria established by an Executive order to be kept secret in national defense or foreign policy, and (B) are in fact properly classified pursuant to such Executive order”

5 USC § 552(b)(1)

Executive Order 13,526

National Security Information:

- (a) military plans, weapons systems, or operations;
- (b) foreign government information;
- (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;
- (d) foreign relations or foreign activities of the United States, including confidential sources;
- (e) scientific, technological, or economic matters relating to the national security;
- (f) US government programs for safeguarding nuclear materials or facilities;
- (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to the national security;
- (h) the development, production, or use of weapons of mass destruction.
- [(i) US international negotiating position regarding how to deal with copyright piracy of Adele's Grammy Award winning album "21"]

USTR Feb. 10, 2009 Draft ACTA FAQ

“Q. What if U.S. positions evolve during negotiations?”

A. “The public can see how the U.S. position has evolved when the final text is signed.”

TPP IPR Chapter Secrecy

- Reason: 1.4(b) [foreign government information]
- Declassify on: Four years from entry into force of the TPP agreement or, if no agreement enters into force, four years from the close of the negotiations.

Observation Two: Transparency, Accountability and Public Input

“An hour after sending out our invite to negotiators (including USTR [the United States Trade Representative]) for the briefing we scheduled in the negotiation venue (Sofitel hotel), we received a note from the hotel that they had been asked to cancel our reservation. We moved the workshop. But later found out that not all groups got the same treatment. All negotiators were invited by the host (USTR) to a private tour of 20th Century Fox studios, led by a member of Fox’s government relations staff.”

Email from Sean Flynn of American University School of Law’s Program on Information Justice and IP to IP Enforcement Listserv regarding TPP meeting in LA, February 1, 2012 .

Observation Three: Poorly Drafted/Imbalanced Law

“There is a problem. Let’s take our time. Let’s do it right. There is a problem. But let’s bring the nerds in and get this right.”

Rep. Jason Chaffetz (R-UT) during SOPA markup, Judiciary Committee, December 15, 2011.

TPP IP Chapter Article 4.1 (Feb. 2011)

Each Party shall provide that authors, performers, and producers of phonograms have the right to authorize or prohibit all reproductions of their works, performances, and phonograms, in any manner or form, permanent or temporary (including temporary storage in electronic form).

[Phonogram = the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work (Article 6.5(e))]

Proposal One: Theory

- In order to optimize our FOIA system and understand the impact of FOIA's national security exemption in the lawmaking context, we need to focus more on when public inputs *to government* are most useful and currently lacking without diminishing the focus on what outputs are properly shared *by government* with the public.
- Focus on the nerds – the experts

Proposal Two: Policy

- Qualified public right to national security information involving lawmaking
- Stronger right and presumption for United States negotiation texts and other information
- Limited right for foreign government negotiating texts and other information based on whether foreign government has expressed willingness to make the information public and whether any cognizable harm to United States or foreign government may arise from disclosure